NECESSARY ALLEGATIONS IN BILL FOR DIVORCE.

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Is not our Court of Appeals wrong in the recent case of *Miller v. Miller*, 23 S. E. Rep. 232, where the statement is made, *obiter*, that in a bill of complaint for divorce on the ground of adultery it is not necessary either to allege the name of the *particeps criminis*, or the fact of its being unknown?

The bill in that case alleged that "since her said marriage her said husband has been guilty of adultery on many occasions, and she has not lived or cohabited with him since she so learned that fact." The court decided that the allegation was too indefinite and that a demurrer to the bill was properly sustained. That this decision was right, is clear enough. But the court went further, and after quoting the opinion of Chancellor Walworth in *Wood v. Wood*, 2 Paige 113, to the effect that "If the persons with whom the adultery was committed are known, they must be named, . . . and the adultery must be charged with reasonable certainty as to time and place, and if they are unknown, the fact should be stated," and after citing numerous other authorities maintaining the same proposition, including Mr. Bishop, proceeds to overrule so much of it as requires the name of the *particeps criminis* to be stated or an excuse given for not stating it. Says the court: "We do not, however, agree that the name of the person with whom the adultery was committed need be given, but in all other respects we concur fully in the rule as stated by Chancellor Walworth." No reason is assigned for the *dictum*, and no case is quoted in its support. I humbly submit that it can be sustained neither by reason nor authority.

There is no decision, nor even a *dictum*, in Virginia on this point, though the court in *Hampton v. Hampton*, 87 Va. 148, in vigorous language, holds that a bill which alleges the name of the *particeps criminis* but gives neither time, place, nor circumstances, is altogether too vague. But in the other State courts there are many cases holding that the name must be given, or must be alleged to be unknown. The text-writers with one accord hold the same doctrine.

The only American law I have been able to discover in support of the *dictum* are two other *obiter dicta*, one in *Farr v. Farr*, 34 Miss. 597 (69 Am. Dec. 406), and the other in *Germond v. Germond*, 6 Johns. Ch. 347, (10 Am. Dec. 335). The first of these argues that to allege the name of the *particeps criminis* might create scandal involving the reputation of a third party who has no opportunity of defending himself. The latter is based on some English cases not involving any question whatever in divorce proceedings. The same reason would compel the suppression of the name in the testimony, and therewith all facts from which it might be inferred. Even if the name were not given, the bill must allege the particular circumstances of the adultery, and the innocent third party's character would be injured as much by insinuations as by open accusation. In *Croft v. Croft*, 3 Hag. Ec. 310 (5 Eng. Ec. 120), Dr. Lushington said, in connection with the question of scandal involving the reputation of third persons in divorce proceedings: "Justice must be done to suitors, so that it is impossible to exclude matter which ought to be admitted in evidence because incidentally it may affect the character and involve the conduct of those who are not parties to the suit."

Mr. Browne says: "The objection that naming the alleged *particeps criminis* in the pleadings might possibly bring in an innocent party and cause scandal, is not

tenable, and it must be mentioned if known." Browne on Divorce, 24. "The name of the alleged *particeps criminis*, if known, should be stated in the answer, and if not known, that fact should be therein stated." Ib. 82.

Mr. Bishop, the great oracle of the law of marriage and divorce, examines this question with accustomed ability in his new work on Marriage, Divorce and Separation.

In referring to *Farr v. Farr*, he says: "It is evident that the name of the person with whom the adultery was committed is the very gist of the description thereof. Still there are judges who object to requiring it, on the ground of scandal and injury to a person not a party to the suit." And, after quoting Dr. Lushington as above, the author continues: "And the rule has become established that the libellant must allege the name if he knows it; if not, he must so state." 2 Bish. Mar. Div. & Sep. sec. 1333. In Ib. sec. 1326, Mr. Bishop gives the form of the the allegation in the Ecclesiastical Courts of England prior to the establishment of the Divorce Courts, in which the name of the paramour is given, with particulars. In the later English practice, the same allegation is required: 2 Ib. 576; and so under the Massachusetts practice: Oliver's Precedents (5th ed.) 679. And it is elementary that in a criminal indictment for adultery the name of the *particeps criminis* must be alleged, regardless of injury to his on her reputation.

In *Wood v. Wood*, 2 Paige, 113, quoted in *Miller v. Miller*, and acknowledged as authority in a number of cases, Chancellor Walworth says that if the name is unknown that fact must be alleged, and if the name be known it must be given. And further: "As to the manner in which the adultery should be charged in the bill or answer, the case of *Germond v. Germond* has been quoted, but it throws but little light on the subject. The extent of the decision in that case was that the person with whom the adultery was committed need not be named *if his name was not known to the complainant.*"

In *Choate v. Choate*, 3 Mass. 392, it is held: "If the names of the persons, with whom the adultery has been supposed to be committed, are unknown to the libellant, an averment to that effect is necessary." In *Marsh v. Marsh*, 16 N. J. Eq. 391 (84 Am. Dec. 164), the court holds: "The party with whom the crime is believed to have been committed must be named, or if unknown, an averment to that effect is necessary."

The same principle is maintained in *Church v. Church*, 3 Mass. 157; *Morrell v. Morrell*, 1 Barb. 318; *Freeman v. Freeman*, 39 Minn. 307; *Codd v. Codd*, 2 Johns. Ch. 224; *Mitchell v. Mitchell*, 61 N. Y. 398; *Garrat v. Garrat*, 4 Yeates, 244; *Dunlap v. Dunlap*, Wright, 302; *Sanders v. Sanders*, 25 Vt. 713; *Mansfield v. Mansfield*, Wright, 284; *Bird v. Bird*, Wright, 98; *Trubee v. Trubee*, 41 Conn. 36; *Black v. Black*, 12 C. E. Green, 664; *Freeman v. Freeman*, 31 Wis. 235; *Scheffling v. Scheffling*, 17 Stew. Ch. 438.

So rigidly is the principle of exactness and particularity insisted upon that a charge of adultery with one person is not sustained by proof of adultery with another person. *Adams v. Adams*, 20 N. H. 299 (51 Am. Dec. 219); 2 Bish. Mar. Div. & Sep. 1343.

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